

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BRIAN MULHOLLAND
620 ASHTON PL NE APT #303
CEDAR RAPIDS IA 52402

UNITED STATES CELLULAR
CORPORATION
c/o TALX UC EXPRESS
PO BOX 283
ST LOUIS MO 63166-0283

Appeal Number: 05A-UI-05275-RT
OC: 04/17/05 R: 03
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319**.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, United States Cellular Corporation, filed a timely appeal from an unemployment insurance decision dated May 9, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Brian Mulholland. After due notice was issued, a telephone hearing was held on June 3, 2005, with the claimant participating. Angie Baily, Human Resources Coordinator, and Matthew Thompson, Coach, participated in the hearing for the employer. Employer's Exhibits One and Two were admitted into evidence. The administrative law judge takes official notice of Iowa Workforce Development Department unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, including Employer's Exhibits One and Two, the administrative law judge finds: The claimant was employed by the employer as a full-time customer service representative from August 5, 2002, until he was discharged on April 22, 2005, for poor attendance and, in particular, tardies. In the slightly more than one month before the claimant's discharge, the claimant was tardy six times as follows: April 16, 2005, two minutes, when he assisted in cleaning up a beverage spilled by someone else; March 25, 2005, two minutes; March 22, 2005, three minutes; March 12, 2005, two minutes; March 10, 2005, five minutes; March 8, 2005, two minutes. With the exception of the tardy on April 16, 2005, none of the other tardies were properly reported. The claimant could not remember why he was tardy on these occasions, other than that he overslept. The employer has a rule or policy, as shown at Employer's Exhibit Two, a copy of which the claimant received and for which he signed an acknowledgement, requiring that employees notify the employer 30 minutes prior to the start of their shift for any absence or tardy. The claimant did not do so for the tardies, as noted above.

The claimant had a number of absences for personal illness, all of which were properly reported, or there was no evidence that they were not properly reported, as follows: February 24, 2005; January 29, 2005; January 22, 2005; December 2 and 3, 2004. Some of these absences occurred after the claimant had exhausted all of his sick leave available to the claimant. The claimant was also tardy on December 9, 2004, 3 hours and 13 minutes because he had a flat tire at home. The claimant had no spare tire. The claimant lives in Cedar Rapids, Iowa, and the employer is in Marion, Iowa, and although there is cab service, and perhaps even bus service, the claimant was not aware of what bus service there was, and testified that he could not pay for a cab. The claimant also did not timely report this tardy to the employer.

The claimant received two warnings for his attendance, as shown at Employer's Exhibit One. The claimant received a verbal warning with a written record on September 16, 2004, and a final written warning on December 10, 2004. He was informed at that time that further violations of the attendance policy could result in further disciplinary action up to, and including, termination. Pursuant to his claim for unemployment insurance benefits filed effective April 17, 2005, the claimant has received unemployment insurance benefits in the amount of \$1,017.00 as follows: \$87.00 for benefit week ending April 23, 2005 (earnings \$300.00); and \$310.00 per week for three weeks from benefit week ending April 30, 2005 to benefit week ending May 14, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was.
2. Whether the claimant is overpaid unemployment insurance benefits. He is.

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

871 IAC 24.32(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

The parties agree, and the administrative law judge concludes, that the claimant was discharged on April 22, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. Excessive unexcused absenteeism is disqualifying misconduct and includes tardies, and necessarily requires the consideration of past acts and warnings. Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984). The administrative law judge concludes that the employer has met its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The evidence establishes that, in slightly more than one month prior to his discharge, the claimant had six

tardies, as set out in the findings of fact. These tardies were of relatively short duration, but aside from the last tardy on April 16, 2005, the claimant had no reason for the tardies, other than that he overslept. Concerning the last tardy, the claimant testified that he cleaned up the spill of a beverage, but the claimant was not the one who had spilled it. Because of the claimant's warnings, and attendance record, the administrative law judge believes that the claimant should have been more inclined to go to work than to assist in cleaning up a spill in the break room. The claimant had received a verbal warning with a written record for his attendance on September 16, 2004, and then was given a final written warning on December 10, 2004. The claimant was aware, or should have been aware, that the employer was concerned about his attendance. Nevertheless, the claimant had the tardies as noted above. The tardies were not properly reported, except possibly for the one on April 16, 2005.

Under the evidence here, the administrative law judge is constrained to conclude that the number of tardies was excessive and unreasonable, and the reasons for the tardies were not for personal illness or other reasonable cause, and they were not properly reported, and, therefore, they are excessive unexcused absenteeism. The administrative law judge notes that the claimant also had another tardy on December 9, 2004, for 3 hours and 13 minutes because of a flat tire. The administrative law judge notes that the flat tire was at home, not while commuting to work. The claimant could have taken a cab, or a bus, but did not do so. The claimant testified that he did not know what the bus route was and could not afford a cab. The claimant's testimony is not wholly credible, because the administrative law judge does not understand why it took the claimant over three hours to get to work for a flat tire. The claimant testified that he had no spare tire, but this also seems unreasonable. The claimant did have five absences for personal illness, which were properly reported, as set out in the findings of fact, and these absences are not excessive unexcused absenteeism. Nevertheless, the administrative law judge concludes that the claimant's tardies were excessive unexcused absenteeism and disqualifying misconduct. Therefore, the administrative law judge concludes that the claimant was discharged for disqualifying misconduct and, as a consequence, he is disqualified to receive unemployment insurance benefits. Unemployment insurance benefits are denied to the claimant until or unless he requalifies for such benefits.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of \$1,017.00 since separating from the employer herein on or about April 22, 2005, and filing for such benefits effective April 17, 2005. The administrative law judge further concludes that the claimant is not entitled to these benefits and is overpaid

such benefits. The administrative law judge finally concludes that these benefits must be recovered in accordance with the provisions of Iowa law.

DECISION:

The representative's decision of May 9, 2005, reference 01, is reversed. The claimant, Brian Mulholland, is not entitled to receive unemployment insurance benefits, until or unless he requalifies for such benefits, because he was discharged for disqualifying misconduct. He has been overpaid unemployment insurance benefits in the amount of \$1,017.00.

kjw/pjs